Lau Hui Sing v Wong Chuo Yong (f)

HIGH COURT (SIBU) — DIVORCE PETITION NO 33–15 OF 2006
HAMID SULTAN JC
9 JULY 2008

Family Law — Children — Maintenance — Application by husband to vary terms in consent order — Whether husband demonstrated any material change or circumstance to vary order — Husband did not disclose assets — Whether non-disclosure of assets to warranted dismissal of application — Whether application oppressive against wife and an abuse of process of the court

This was the husband petitioner's application seeking an order that the wife petitioner ('the respondent') contribute RM450 or such other sum as the court may deem just and proper towards the maintenance of their three children and a further order that the Great Eastern Life Assurance (M) Bhd GE Life Education Planner taken out in the name of the wife petitioner be varied to the sole name of the husband petitioner or the joint name of the husband petitioner and/or the wife petitioner. The respondent opposed the application on the grounds that she was earning a small income and had to look after her sick mother. Prior to this application, a decree absolute was perfected and the consent order made by the court favoured the ex-husband. There was no provisions made for the maintenance of the wife nor the sharing of matrimonial assets. Further, in making this application, the ex-husband had only stated his income but not his assets. The issue for determination was whether the application was oppressive against the respondent and an abuse of the process of the court.

Held, dismissing the application with costs:

(1) As a general rule, consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court for the benefit of the minor children. In this case, the consent order was made less than two years ago and the ex-husband had not demonstrated in the affidavit any material change or circumstance to vary the order, taking into consideration there is a greater duty and responsibility for the father to maintain his children (see para 11(i)–(ii)).

(2) The ex-husband had not disclosed his assets, movable and immovable and this material non-disclosure warranted the court to dismiss the application *in limine*. Further, the court was of the view that the ex-husband's application was not only oppressive against the ex-wife, but was an abuse of process and warranted the court to initiate contempt proceeding on its own motion, as such non-disclosure of assets as well as the application without justifiable reasons attempts to undermine the dignity of the court and court proceedings (see para 11(iii)–(iv)).

[Bahasa Malaysia summary

Ini adalah permohonan pempetisyen suami memohon perintah agar pempetisyen isteri ('responden') menyumbangkan RM450 atau jumlah lain seperti yang dianggap adil dan wajar oleh mahkamah terhadap penjagaan tiga orang anak mereka dan perintah selanjutnya agar Great Eastern Life Assurance (M) Bhd GE Life Education Planner yang dibuat atas nama pempetisyen isteri diubah kepada nama tunggal iaitu pempetisyen suami atau nama bersama pempetisyen suami dan/atau pempetisyen isteri. Responden telah membantah permohonan tersebut atas alasan bahawa dia memperoleh pendapatan kecil dan perlu menjaga ibunya yang sakit. Sebelum permohonan ini, dikri mutlak telah disempurnakan dan perintah persetujuan yang dibuat oleh mahkamah menyebelahi bekas suami. Tiada peruntukan dibuat untuk nafkah isteri mahupun pembahagian aset-aset perkahwinan. Isu yang perlu ditentukan adalah sama ada permohonan tersebut menindas responden dan suatu penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan dengan kos:

(1) Sebagai rukun am, perintah persetujuan meskipun dalam perkara perceraian patut jarang diganggu kecuali jika terdapat keadaan yang luar biasa dan yang juga jelas dinyatakan dalam afidavit untuk mewajarkan campur tangan mahkamah demi kepentingan anak-anak bawah umur. Dalam kes ini, perintah persetujuan telah dibuat kurang daripada dua tahun sebelumnya dan bekas suami tidak menunjukkan dalam afidavit apa-apa perubahan atau keadaan material untuk mengubah perintah tersebut, dengan mempertimbangkan terdapat tugas dan tanggungjawab yang lebih besar untuk bapa menanggung anak-anaknya (lihat perenggan 11(i)–(ii)).

(2) Bekas suami tidak mendedahkan aset-asetnya, yang boleh alih dan tak boleh alih dan dengan tidak mendedahkan perkara material ini mewajarkan mahkamah menolak permohonan tersebut *in limine*. Seterusnya, mahkamah berpendapat bahawa permohonan bekas suami

itu bukan hanya menindas terhadap bekas isteri, tetapi penyalahgunaan proses dan mewajarkan mahkamah memulakan prosiding penghinaan dengan usulnya sendiri, berdasarkan aset-aset yang tidak didedahkan dan juga permohonan tanpa alasan-alasan berjustifikasi yang cuba menjejaskan martabat mahkamah dan prosiding mahkamah (lihat perenggan 11(iii)–(iv)).]

Notes

For cases on children maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3023–3037.

Cases referred to

Gisela Gertrud Abe v Tan Wee Kiat [1986] 2 MLJ 297 (refd)
Minton v Minton [1979] 1 All ER 79 (refd)
Parkunan a/l Achuligam v Kalaiyarasy a/p Periasamy [2004] 6 MLJ 240 (folld)
Santha Devi Thuraisingam v A Shanmugananthan [1990] 3 CLJ (Rep) 47 (refd)
Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent) [1992] 2 MLJ 870 (refd)
YCC @ JCC v LSY [2006] 7 MLJ 137 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 89, 96

Paul Liong (Liong & Co) for the husband petitioner.
Meling ak Sambang (Assistant Director Legal Aids Bureau) for the wife petitioner.

HAMID SULTAN JC:

[1] This is my judgment in respect of the application of the ex-husband seeking an order as follows:

... for an order that the wife petitioner do contribute RM450 or such other sum as the court may deem just and proper towards the maintenance of the three children and a further order that the said Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No 8052094-7 taken out in the name of the wife petitioner be varied and read as follow:

That as a condition for the husband petitioner continuing to pay the premiums for the Great Eastern Life Assurance (Malaysia) Sdn Bhd GE Life Education Planner Policy No 8052094-7 taken out in the name of the wife petitioner for the life of the child of the family, GABRIELLE LAU SING JIEH, the wife petitioner expressly consents and agrees that the said Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No 8052094-7 be varied to the sole name of the husband petitioner or the joint-name of the

husband petitioner and/or the wife petitioner. The wife petitioner shall not surrender the said insurance policy during the tenure of the same in the event that there is any payment from this policy to the wife petitioner, the wife petitioner shall forthwith forward the whole sum to the husband petitioner for the sole benefit of the said child GABRIELLE LAU SING JIEH effective from the date of this order.

[2] Grounds of the application are stated as follows:

(a) There is a material change of circumstances that the husband petitioner may need the wife petitioner to contribute to the maintenance of the three children given the financial status of the husband petitioner after the order made on the 21 March 2006.

(b) Since the wife petitioner is not contributing to the payment of the premiums of the said Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No 8052094-7 which is taken out in the name of the wife petitioner for the life of the child of the family, GABRIELLE LAU SING JIEH, it would only be fair and reasonable that the same be varied to the joint name of husband petitioner and/or the wife petitioner for the sole benefit of the said child as the husband petitioner is solely responsible for the payment of the same.

BRIEF FACTS

[3] In this case, decree absolute has already been perfected; and by the first consent order, the court made the following orders namely:

(a) that the said marriage may be dissolved;

(b) that there shall be no maintenance for the wife petitioner;

(c) that the husband petitioner shall have the sole custody, care and control of the three children of the marriage, namely, Gabrielle Lau Sing Jieh, Osrin Lau Li Shen and Quinne Lau Chin Yee, with reasonable access to the wife petitioner which shall be arranged between the petitioners;

(d) that the husband petitioner shall continue to pay the premiums for the Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No 8052094-7 taken out in the name of the wife petitioner for the life of the child of the family, Gabrielle Lau Sing Jieh, and that in the event that there is a payment from this

policy to the wife petitioner, the wife petitioner shall forthwith forward the whole sum to the husband petitioner;

(e) that the costs of this petition shall be borne solely by the husband petitioner;

(f) that there be liberty to apply.

PRELIMINARY

[4] It is material to note that at the time the consent order was made no provision for maintenance was provided for the wife. The consent order by all means was largely in favour of the ex-husband. Any person conversant in the legal jurisprudence relating to law of marriage and divorce would say the order is not at all favourable to the wife petitioner, more so when, during the wedlock, the wife petitioner must have gone through great pain and suffering in giving birth to three children and taking care of them. There were no provisions made also for the sharing of matrimonial assets. Further, in making this application, the ex-husband had only stated his income but has not disclosed his assets which are a material consideration when dealing with such an application. In fact, I will go to the extent of saying that when an application to disturb a consent order is made and thereby to re-open old wounds, and if the ex-husband does not disclose material evidence and circumstances for making the application, the court must not take it lightly, if it is seen to be oppressive against the respondent. It is an abuse of process of court, serious enough to warrant a contempt proceeding against the ex-husband, on the court's own motion, to install discipline after an order for dissolution has been granted and duly accepted, and when the ex-husband attempts, to undermine the dignity of the court and court proceedings.

[5] The ex-husband's affidavit in support reads as follows:

> Pursuant to the court order dated 21 March 2006, I was granted the sole custody, care and control of my children name Gabrielle Lau Sing Jieh (nine years old), Osrin Lau Li Shen (four years old) and Quinne Lau Chin Yee (three years old) ('the said children') with reasonable access to the wife petitioner. The said court order was subsequently varied by another court order dated 17 October 2006 thereby fixing the time access to the wife petitioner. A copy each of the said order is annexed herewith and marked 'L1' and 'L2'.
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> Due to growing age of the said children, the costs of maintaining them have also increased substantially ie food, milk, clothing, books, stationeries, extra tuitions, transport and care excluding my time spent on them. The particulars of the same is as follow:

a)	food, milk powder	RM110.00
b)	Gabrielle tuition	RM 58.00
c)	Quinne & Osrin's home tuition	RM180.00
d)	Osrin's tuition fee & expenses	RM100.00
e)	Osrin's & Quinne kindergarden fees	RM 60.00
f)	Children's expenses like clothing,books, stationeries	RM300.00
g)	care taking by grandmother of the said children	RM300.00
	Total	RM1108.00

I annexed herewith sample expenditures of tuitions receipts in respect of the said children and marked 'L3'.

I also append below my own expenses (inclusive of my contribution towards the household expenses as I am staying with my parent) per month more particular are as follow:

a)	in-house maid	RM500.00
b)	blood pressure medication	RM 60.00
c)	payment for car loan	RM895.00
d)	fuel for transportation	RM280.00
e)	Sesco and water bills	RM500.00
	Total	RM2235.00

I also bought 6 insurance policies for the benefit of my said children and the estimated monthly payment for the same is as follow:

a)	Gabrielle insurance	RM139.80 (marked as 'L4')
b)	Osrin insurance	RM108.10 (marked as 'L5')
c)	Quinne insurance	RM100.00 (marked as 'L6')
d)	My insurance (88664791)	RM164.00 (marked as 'L7')
e)	My insurance (63597631)	RM160.00 (marked as 'L8')
f)	My insurance (92037149)	RM144.00 (marked as 'L9')
g)	Medi-care card	RM160.00 (marked as 'L10')
	Total	RM975.90

Hence, my estimated monthly expense is in the region of RM4318.90 per month after the said court order dated 21 March 2006.

In the circumstances, I verily believe that the wife petitioner, whom is also the natural mother of the said children, is also under a duty to contribute to the maintenance of the said children in view of the constrained finance status as my income is RM3000 per month.

I also applied to vary the court order dated 21 March 2006 as prayed for in this application on the ground that since I am ordered and responsible for the continue payment of the premium for the Great Eastern Life Assurance (Malaysia) Berhad GE

Life Education Planner Policy No 8052094-7 taken out in the name of the wife petitioner, it is fair and reasonable that the said insurance policy be varied to my sole name or the joint of the wife petitioner and/or me for the sole benefit of the said child Gabrielle Lau Sing Jieh as the same is living with me and where I am also solely responsible for the care custody of the same.

[6] The respondent opposes the application on the grounds; she is earning a small income and looking after her sick mother. I do not think it is necessary to set out the full facts of what the respondent says but is sufficient for the court to conclude that what ever the respondent earns, may not even be sufficient to look after her personal needs presently and in the near future as she is only having a temporary job as a clerk. The respondent submits as follows:

Under s 83 of the Law Reform (Marriage and Divorce) Act 1976 stated that:

> The court may at anytime and form time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

In the case of *YCC v LSY* [2006] 7 MLJ 137, His Lordship Judge Clement Skinner stated that:

> First, the husband carries the evidential burden of satisfying the court, on a balance of probabilities, that there is a material changer of circumstances.

The husband petitioner did not disclose his true financial position. In the case of *YCC v LSY* [2006] 7 MLJ 137, His Lordship held that:

> The husband's assertion about his present financial status was equivocal and unconvincing. It did not follow as matter of course that just because there were two judgments entered against him and he had an overdraft at his bank, the husband was in dire straits. Whether he was or not depended on his earnings and sources of income and how his business were doing: what his other liabilities were and what other assets and investments he owned, not only in Malaysia but elsewhere. No genuine attempt had been mad by the husband to disclose to the court his true financial position.

Upon Decree Nisi dated on 21 May 2006 the husband petitioner had been granted with sole custody, care and control of his three children. It's a husband obligation to maintain a child of marriage ceases upon that the child attaining the age of 18 years unless the child is physically or mentally disable. This decision was held by the Federal Court in the case of *Karunairajah a/l Rasiah v Punithambigai a/p Puniah* [2004] 2 MLJ 401, which referred to case of *YCC v LSY* [2006] 7 MLJ 137.

Therefore based on the above case, I submitted that the husband petitioner did not have any merit in the application to said order. I also contended that there is no material change in circumstances in his application.

THE LAW

[7] As a general rule, consent order cannot be set aside, varied or discharged. Though, there are statutory exceptions to this rule in matrimonial matters, it is incumbent on the court as a matter of public policy to ensure that the issues are not re-litigated again; and again and in this case within less than two years after the consented divorce petition was allowed. This is in line with the concept of 'clean break' principles advocated in a number of cases (see *Minton v Minton* [1979] 1 All ER 79). There are one or two exceptions to 'clean break' concept. For example, consent order for a property settlement is a final order (see *Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)* [1992] 2 MLJ 870). However, if the said consent order is inextricably interwoven with the maintenance order, the court has discretion to amend. In *YCC @ JCC v LSY* [2006] 7 MLJ 137, Justice Clement Skinner articulated the proposition as follows (at pp 147–148):

> … So it is evident from what is stated there that the husband had agreed to buy the Singapore apartment for the wife in settlement of all future claims to maintenance by her. When that obligation became a term of the order of 20 April 2001, it did not lose its character even though it was not expressed in the form of a payment in cash over a period of time. Being an order for maintenance, it is my view that irrespective of the fact that it was a consent order, paragraph 1(c) of the order of 20 April 2001 is amenable to being varied or rescinded under s 83 of the Act …

[8] Sections 89 and 96 of the Law Reform (Marriage and Divorce) Act 1976 give the court the discretion 'to decide all questions relating to the upbringing and education of the child' but 'subject to such conditions as the court may think fit to impose' by varying or rescind any subsisting maintenance order for periodical payments for the children, where there is any material change in the circumstances. These sections were considered by the Supreme Court in the case of *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297 where George Seah SCJ observed (at p 298):

> In our opinion, the answer to this submission depends upon the true construction to be given to ss 83 and 96 of the Law Reform (Marriage and Divorce) Act 1976. ('the Act'). It is common ground that these sections give to the court a general power to vary or rescind any subsisting periodical payments for the wife (s 83) and/or the children (s 96) of the marriage where it is satisfied that it was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Now to 'rescind' means to abrogate, annual, revoke, cancel, discharge or to put an end to altogether. It follows that when a maintenance order is rescinded by a court order it ceases to exist henceforth. Adopting this interpretation, we are constrained to hold that the general power contained in ss 83 and 96 of the Act does not empower the court to make an order discharging the maintenance order for a limited period of time. That however, is not the end of the matter. It seems to us that the learned judge did not intend to abrogate the maintenance order altogether as it was clear from the latter part of the court order that it was to take effect at a reduced rate of RM800 per month from 6 January 1984 to 31 May 1985 and thereafter at RM400 each month from 1 June 1985 onwards. It appears to us that the learned judge has intended the maintenance order to be suspended during the period when the respondent was unemployed after having been retrenched by his employer from 6 June 1983 to 5 January 1984. The question we have to determine was whether or not the court had the power to do so under ss 83 and 96 of the Act? In our opinion, the word to 'vary' should be given a wide meaning and should not be confined only to increase or reduce the amount of the periodical payments or maintenance for the wife and/or the children of the marriage but also to include power to 'suspend' the maintenance order or any provisions therein temporarily and to revive the operation of the maintenance order or any provisions so suspended. Applying this to the facts therein we rule that the learned judge had the power under the provisions of ss 83 and 96 of the Act to make an order suspending the operation of the order to maintenance during the period from 6 June 1983 to 5 January 1984 respectively.

[9] For generations it has been an accepted norm that the duty to maintain the children falls on the father. The above sections were not meant to give some new rights to the father but it was meant to assist the mother who has custody and control of the children to seek for further maintenance if necessary. That does not mean that the father cannot rely on the section though it was not strictly meant to be so. Support for my proposition can be garnered from a number of cases. In *Parkunan a/l Achuligam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240 it was stated (at p 243):

In determining the amount of maintenance to be paid, the assessment is based primarily on the means and the needs of the parties. The needs of the party seeking maintenance is the crucial factor for providing the maintenance. In deciding the quantum of maintenance, the capacity of the husband, his ability to pay and the realities of the husband or parties financial position should be taken into account. One other factor, the potential earning of the applicant should also be considered. The power to award maintenance to the wife is clearly provided by s 77 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). Section 78 of the LRA provides that in asserting the amount of maintenance to be paid by a man to his wife or former wife, 'the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage'.

[10] Courts have also set down clear guidelines when dealing with such an application, to vary an existing order for maintenance. In *Santha Devi Thuraisingam v A Shanmugananthan* [1990] 3 CLJ (Rep) 47 the court stated:

> Before I proceed to scrutinise the two versions presented by the parties, it is useful to remind myself of the following advice of the Supreme Court (which I have briefly adverted to earlier) in *Gisela Gertrud Abe v Tan Wee Kiat* [1986] CLJ (Rep) 133 at p 137:
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> > In our opinion, when an application is made to the court to vary an existing order for maintenance, the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date including any changes which the court is required to have regard to under s 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible.
>
> I shall start with examining the facts and circumstances on which the original maintenance order was made. In granting the said order the learned judge must have taken into consideration that it is the duty of a parent to maintain or contribute to the maintenance of his or her children whether they are in his custody or her custody either by providing then with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and status in life or paying the cost thereof — see s 92 of Act 164. In considering the maintenance of the wife the learned judge must also have taken into consideration the matters set out in s 78 of the said Act which says that in assessing the quantum of maintenance the court shall base its assessments primarily on the means and needs of the parties regardless of the proportion such maintenance bears to be income of the husband or wife as the case may be.

[11] I have read the application, affidavits and submissions of parties in detail. I take the view that the application must be dismissed. My reasons are as follows:

(i) As a general rule, consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court for the benefit of the minor children.

(ii) In this case, the consent order was made less than two years ago and the ex-husband has not demonstrated in the affidavit any material change of circumstance to vary the order, taking into consideration there is a greater duty and responsibility for the father to maintain his children.

(iii) I find that the ex-husband has not disclosed his assets, movable and immovable and this material non-disclosure warrants the court to dismiss the application *in limine*.

(iv) After reading the affidavits and the previous consent order, I take the view that the ex-husband's application is not only oppressive against the ex-wife, but is an abuse of process and warrants the court to initiate contempt proceeding on its own motion, as such non-disclosure of assets as well as the application without justifiable reasons attempts to undermine the dignity of the court and court proceedings. I shall take the liberty to deal with this issue at the court's own pace.

[12] For reasons stated above, I dismiss the application with costs to the respondent. The getting up fees shall not exceed RM10,000. In the event the respondent has agreed to pay higher legal costs to the respondent's solicitor, the applicant shall pay the full costs on the full indemnity basis to the respondent. If costs cannot be agreed the respondent is at liberty to tax the costs. The deputy registrar shall take note of this judgment when dealing with taxation of costs.

Application dismissed with costs.

Reported by Ezatul Zuria Azhari